

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2466

Cir. Ct. No. 2001CV816

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GORDON C. MICHAELS AND KATHY J. MICHAELS,

PLAINTIFFS-APPELLANTS,

V.

KETTLE MORaine ELECTRIC, INC.,

DEFENDANT-RESPONDENT,

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Gordon C. and Kathy J. Michaels appeal from the decision and judgment of the circuit court granting summary judgment to Kettle Moraine Electric, Inc. The Michaels raise a number of issues on appeal having to do with when their cause of action for negligence accrued against Kettle Moraine. Because we conclude that the issue of whether the Michaels acted with reasonable diligence under the discovery rule involves a material issue of fact, we reverse and remand the matter to the circuit court.

¶2 The Michaels sued Kettle Moraine in 2001 alleging that it was responsible for damages caused by stray voltage. The Michaels alleged that Kettle Moraine did electrical work in their barn between 1974 and 1977. In 1982, the Michaels noticed substantial problems with the milk production and health of their dairy herd. In the mid-1980s, their electrician suggested that the problems might be caused by stray voltage. The electrician arranged for the Wisconsin Electric Power Company to conduct some tests on the farm. The Michaels apparently did not pursue the results of these tests. In 1997, the Michaels hired a master electrician to come and investigate whether they had stray voltage. This electrician determined that the cause of the problem was an electrical wiring defect, allegedly caused by Kettle Moraine when it installed some equipment in the barn in 1977.

¶3 Kettle Moraine moved for summary judgment on the basis that the Michaels' lawsuit was barred by the statute of limitations. WIS. STAT. § 893.52 (2003-04).¹ The Michaels responded that their suit was timely under the discovery

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

rule, which starts the statute of limitations when the claimant knew, or with the exercise of reasonable diligence should have discovered, the problem. ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis. 2d 1, 19, 469 N.W.2d 595 (1991). The circuit court granted the motion, finding that the Michaels delayed in diligently pursuing the discovery, and therefore the statute of limitations had run. The Michaels argue to this court that their suit was timely under the discovery rule, or in the alternative, that the question of whether they exercised reasonable diligence in determining the cause of their problem is a question of fact for the jury.

¶4 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Home Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97. In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support of and opposition to the motion. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

¶5 The question of whether a person's efforts were objectively reasonable is often fact intensive and hence a question for the jury. *See, e.g., Kolpin*, 162 Wis. 2d at 15. In its decision granting Kettle Moraine's motion, the circuit court acknowledged this. The court concluded that in this case, however, no reasonable fact finder could find that the Michaels had been reasonably diligent in determining the source of their stray voltage problem. We disagree.

¶6 Kettle Moraine argues, and the circuit court apparently agreed, that the source and cause of the stray voltage problem was within the Michaels' possession and control. Once the Michaels became aware of the fact that the cause of their herd's problems was stray voltage, therefore, with the exercise of reasonable diligence they could have discovered that the source of the problem was the faulty wiring. Almost all of the reported cases in Wisconsin on stray voltage, however, involve negligence by power companies. *See, e.g., Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, 279 Wis. 2d 488, 694 N.W.2d 420, *review denied*, 2005 WI 136, 285 Wis. 2d 627, 703 N.W.2d 376; *Hoffman v. Wisconsin Elec. Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55; *Stunkel v. Price Elec. Coop.*, 229 Wis. 2d 664, 599 N.W.2d 919 (Ct. App. 1999). Unlike the circuit court, we conclude that a fact finder might find that it was reasonable that a lay person would not consider that wiring, rather than the power company, was the source of their stray voltage problem.

¶7 We conclude that the question of whether the Michaels exercised reasonable diligence in attempting to determine the source of the stray voltage is a question of fact and that reasonable people could reach different conclusions. It is, therefore, a question that should be decided by a jury. We reverse the judgment of the circuit court and remand the matter for trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

